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Read.

SUPREME COURT OF THE UNITED STATES.

No. ~~262.~~ 69.

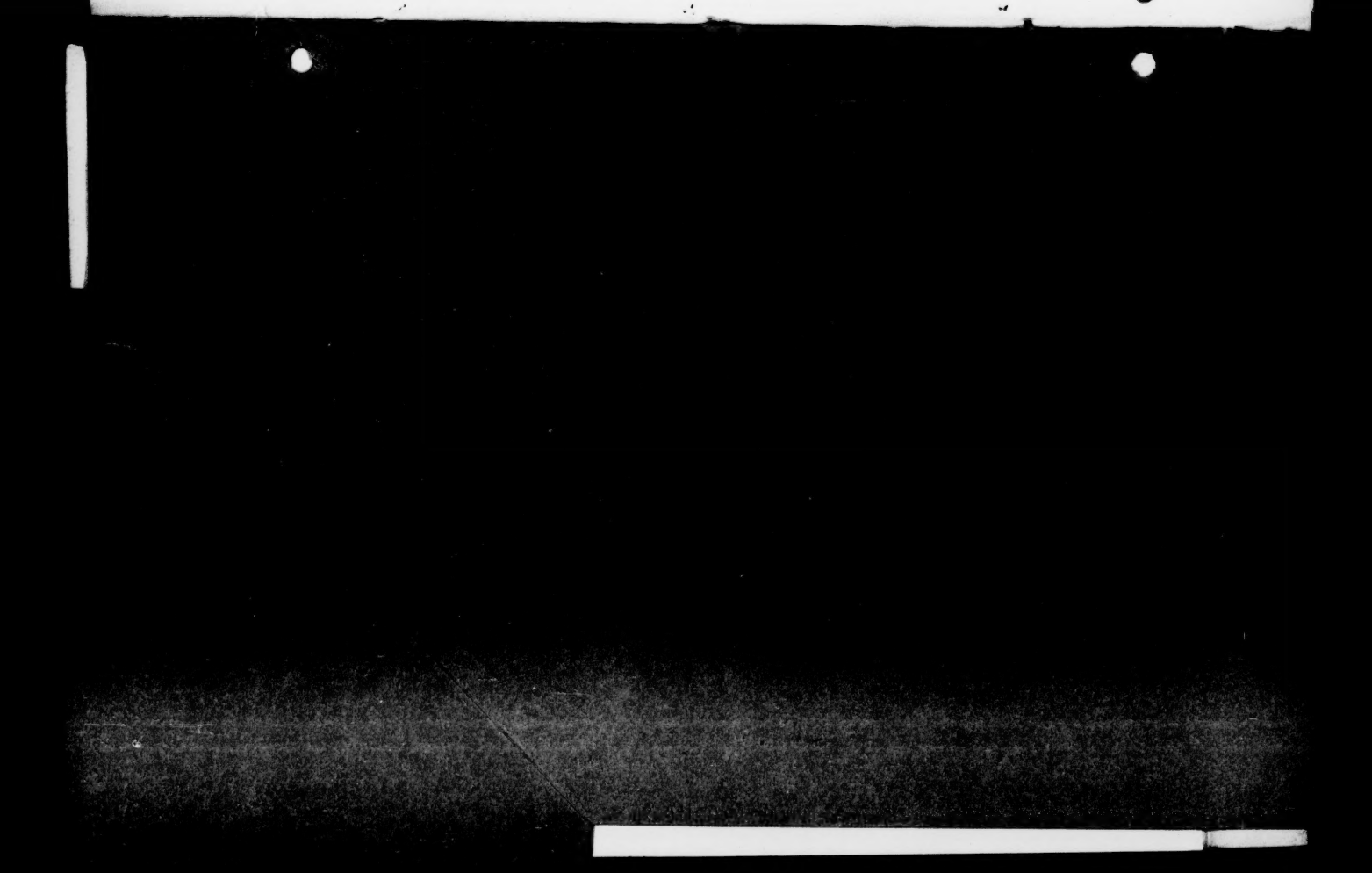
MARINUS W. GARDINER, CITY TREASURER OF THE CITY OF PROVIDENCE, PLAINTIFFS IN ERROR,

vs.

ANNA R. BABCOCK, BY HER NEXT FRIEND, SIMEON R. BABCOCK.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE DISTRICT OF RHODE ISLAND.

GOVERNMENT PRINTING OFFICE.



1199

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1 At a circuit court of the United States for the first circuit, begun and holden at Providence, within and for the Rhode Island district, on the fifteenth day of November, A. D. 1862, before the honorable Nathan Clifford, associate just. Sup. C't U. S., and the honorable John Pitman, district judge.

In the record of the proceeding of said court, among others, are the following, to wit:

ANNA R. BABCOCK
vs.
MARINUS W. GARDINER, city treasurer.

Be it remembered that at the November term of said court, A. D. 1860, the following writ and declaration were filed.

Writ.

RHODE ISLAND DISTRICT, *ss:*

[L. S.] The President of the United States of America to the marshal of said district or to his deputy, greeting:

We command you to summon Marinus W. Gardiner, of the city and county of Providence, in the State of Rhode Island and Providence Plantations, gentleman and city treasurer of said city of Providence, and in his said capacity as treasurer of said city of Providence, and a citizen of said State of Rhode Island and Providence Plantations, if he may be found in your district, to answer the complaint
2 of Anna R. Babcock, of the city and county of New London, in the State of Connecticut, an infant under the age of twenty-one years, who sues this action by her father and next friend, Simeon Babcock, of said city and county of New London; both the said Anna R. Babcock and the said Simeon Babcock, being citizens of said State of Connecticut, at the next circuit court to be holden at the city of Providence, within and for the Rhode Island district, on the fifteenth day of November next ensuing the date hereof, in an action of the case for that the said city of Providence is, and at the time of the grievances hereinafter complained of was, by law bound and obliged to keep all highways, townways, causeways, and bridges lying and being within the bounds of said city, in repair and amended from time to time, so that the same should be safe and convenient for travellers with their teams, carts, carriages, at all seasons of the year; and the plaintiff avers that at the time of committing the grievance hereinafter complained of there was, and now is, in said city of Providence, a certain highway leading from the Great bridge, so called, in said city, southerly of the Old market-house and into South

Main street, or near the foot of College street, so called, being part of Market square, so called, or by whatever other name it may be called, through, over, and upon which the citizens of this State, and all persons were accustomed, and have the right to go, pass, and repass on foot, and with their teams and carriages at their
3 free will and pleasure; and that at the same time, to wit, on the 7th day of September, A. D. 1859, said city of Providence did not and have not repaired and amended said highway and street, so that the same was safe and convenient for travellers on foot, and with their teams, carts, and carriages, to pass and repass; but on the contrary thereof, then and there, and heretofore entirely neglected so to repair and amend the same, and suffered and permitted the same to be out of repair, and not safe and convenient for travellers to pass and repass over and upon, whereby and by reason whereof the said Anna R. Babcock, while passing upon and over said highway and street, on foot, on the 7th day of September, 1859, with proper and ordinary care, was thrown down upon the said highway and street with great force, whereby her hips, limbs, back, body, and other parts of her person was greatly cut, bruised, broken, and otherwise injured, both externally and internally, and whereby she has been caused and suffered great and long-continued pain and suffering; has been confined to her bed and house, and unable for a long time to work, and otherwise greatly suffered, and whereby also she must and will hereafter continue to suffer great pain, and be deprived of the means of moving and going about as before, and continue to be greatly injured, and whereby she has been and must continue hereafter to be put to great costs and expense in procuring medical attend-
4 ance and treatment, and for medical nursing and care, and otherwise continue to be put to great cost and expense in and about taking care of herself by reason of said injuiries; and whereof, also, other wrongs and injuries to said Anna R. Babcock were and there done and sustained.

And the said plaintiff avers that having a claim against said city of Providence for the same, the same was presented to the city counsel of said city of Providence, with a particular account of how the same was incurred; and that the same was so done and presented more than thirty days prior to the commencement of this action, and the same has not been paid or satisfied; and whereby an right of action has accrued to plaintiff in that behalf, as by the to be filed in court will be fully set forth, to the damage of the plaintiff ten thousand dollars.

Hereof fail not, and make true return of this writ with your doings thereon.

Witness the Hon. Roger B. Taney, our chief justice, at the city of Providence, this 13th day of October, anno Domini, 1860.

HENRY PITMAN, *Clerk.*

I stand as surety for costs.

ALVIN F. PAINE.

1203

5 *Marshal's return.*

UNITED STATES OF AMERICA,
Rhode Island District, ss:

OCTOBER 26, 1860.

I have this day made service of the within writ by serving a true and attested copy thereof on Marinus W. Gardiner, esq., city treasurer of the city of Providence, as commanded.

R. CLAPP,
Dep'y U. S. Marshal.

Fees: Service		$2 00
Copy		50
		2 50

Declaration.

RHODE ISLAND DISTRICT, *ss:*

U. S. circuit court.—November term, 1860.

Anna R. Babcock, of the city and county of New London, in the State of Connecticut, an infant under the age of twenty-one years, who sues this action by her father and next friend, Simeon Babcock, of said city and county of New London, both the said Anna R. Babcock, and the said Simeon Babcock, being citizens of said State of Connecticut, complains of Marinus W. Gardner, of the city and county of Providence, in the State of Rhode Island and Providence Plantations, gentleman and city treasurer of said city of Providence, and in his capacity of treasurer of said city of Providence, and a citizen of the State of Rhode Island and Providence Plantations, duly summoned by the marshal of said district in an action of trespass on the case; for that the said city of Providence,
6 in and at the time of the grievances hereinafter complained of, was by law bound and obliged to keep all highways, townways, and causeways and bridges, lying and being within the bounds of said city, in repair, and amended from time to time, so that the same should be safe and convenient for travellers, with their teams, carts, carriages, and on foot, at all seasons of the year; and the plaintiff avers that, at the time of the committing of the grievances hereinafter complained of, there was and now is in said city of Providence, a certain common and public highway, leading from the Great bridge, so called, in said city, easterly and along by the southerly side of the Old market-house, so called, into South Main street, on Market square, and near the foot of College street, in said city, by whatever name said highway may be called, through, over, and upon which, including the side walk thereof, the citizens of this State, and all persons on foot, with their teams, carts, and

carriages, were always accustomed, and have the right to pass and repass on foot, and with their teams, carts, and carriages, at their free will and pleasure; and that at said time, to wit, on the 7th day of September, A. D. 1859, and before said time, said city of Providence had not and did not repair and amend the same highway and the side walk thereof, so that the same were safe and convenient for travellers on foot, and with their horses, teams, carts, and carriages to pass and repass, but on the contrary thereof, then and there, and theretofore entirely neglected so to repair and amend
7 the same, and particularly the side walk on the southerly side of said street, and suffered and permitted the same, and the sidewalk thereof, to be out of repair and unsafe, and not convenient for travellers to pass and repass over and upon on foot, and with their teams, carts, and carriages, whereby and by reason whereof the said Anna R. Babcock, while passing upon and along said street on foot, and on the southerly side-walk thereof, with proper and ordinary care, was thrown down upon said highway and side-walk and into a deep hole therein, with great force, whereby her hips, limbs, back, body, and different parts of her person were greatly cut, bruised, broken, and otherwise injured, both externally and internally, and whereby she has ever since been caused and suffered great pain and suffering; has been confined to her house, and part of the time to her bed, and been for a long time unable to walk, and otherwise has greatly suffered, and whereby also she will and must henceforth continue always to be greatly injured, and to suffer great and constant pains, and be and remain crippled, lame, diseased, and weak in body, and deprived of the means of going about, and of maintaining herself, and whereby she has already been caused and put to great cost, charges, and expenses in procuring medical advice and treatment, and for medicines, care, and nursing, and whereof also she must always hereafter continue to be put to and incur great cost and ex-
8 pense in and about procuring proper medical care and treatment, medicines, and in care and nursing, and remain helpless and dependant, and has been and will continue to be otherwise injured by reason of said neglect and wrong.

And also for that at said city of Providence, on or before the 7th day of September, A. D. 1859, and from that day afterwards, there was and continually has been a certain highway in said city, to wit. the side-walk on the southerly side of the highway or street leading westerly from near the foot of College st. and from South Main street in that city, along on the southerly side of the Old market house, so called, and on to the Great bridge, so called, in said city, and the same then and there was out of repair, and unsafe and dangerous for travellers and foot passengers thereon, by reason of large, deep, and dangerous holes in the same, and which said holes said city of Providence negligently and wrongfully suffered to be and remain in said side-walk, and did not amend and repair it, as it was their duty to do, so that the same should be safe and convenient for travellers, whereby the said Anna R. Babcock, while passing over and along said

highway and upon the southerly side-walk thereof, on said 7th day of September, 1859, with proper and ordinary care, in consequence and by reason of said hole in said side-walk of said highway, was thrown down and into said hole with great force, and whereby her hips, limbs, spine, and divers other parts of her body were greatly cut, bruised, and injured, both externally and internally, and
9 whereby she has ever since been made sick, lame, weak, and diseased, and has, during all said time, suffered great pain, and has been put to great cost and expense in and about procuring medical attendance and treatment and medicines, and for care and nursing, and whereby also she must always hereafter continue lame, sore, crippled, weak, and diseased in body, and suffer great pain therefrom, and must incur great expense continually hereafter for proper care and medical treatment and nursing, and remain helpless and dependent, and whereby she has been and must continue to be otherwise greatly injured and damaged.

And also for that said city of Providence, at said city of Providence, on and before the said 7th day of September, A. D. 1859, wrongfully neglected and refused to keep in repair a certain public highway in said city, leading from the corner of South Water street and the Great bridge easterly, along by and southerly of the Old market-house to South Main street and foot of College street, in said city, called street, or by whatever other name said highway may be called, and the side-walk along the southerly side of said highway appropriated to foot passengers, and wrongfully and negligently suffered and permitted large and deep holes to be and remain in said side-walk, and the same then and there to be and remain out of repair and unsafe for travellers and foot passengers, and whereby said Anna R. Babcock, while passing along and over said highway and said side-walk thereof, at said Providence, on said 7th day
10 of September, A. D. 1859, with proper and ordinary care, was cast and thrown, with great force, down on said side-walk and into a deep hole therein, and thereby her hips, thighs, limbs, spine, back, and other parts of her body were cut, bruised, and injured externally and internally, and whereby she was then and has ever since been made sick, sore, lame, weak, and diseased, and has, during all said time, suffered great pain, and has been put to and incurred great expense and cost for medical attendance and treatment and medicine, and for care, attendance, and nursing, and whereby she must always hereafter remain lame, sore, weak, and diseased, helpless and dependent, and suffering great and continual pain, and continue to be put to great expense and cost for medical attendance and treatment, and for proper care, attendance, and nursing, and otherwise suffer great damage and injury by reason of said wrongful neglect of said city of Providence in the premises.

And the plaintiff avers that after said injury, to wit, on the day of , A. D. 1860, having a claim against said city of Providence for the damage caused by said wrongful neglect of said city, the said claim was presented in writing to the city counsel of said city of Providence for payment, with a particular account of how the

same originated and was incurred, and that the said city of Providence did not and has not paid or satisfied the same, or any
11 part thereof, and that more than thirty days has elapsed since said claim was so presented to said city, whereby a right of action has accrued to the plaintiff against said defendant, in manner aforesaid; all which is to the plaintiff's damage ten thousand dollars, as laid in her writ dated the 13th day of October, A. D. 1860.

Wherefore she sues by her attorney,

WILLIAM H. POTTER.

Plea and reply.

Filed November 9, 1860.

And the said defendant comes and defends, &c., in his said capacity, and says that the said city of Providence is not guilty in manner and form as the said plaintiff in her declaration thereof against him hath alleged, and of this, &c.

By his attorney, J. M. CLARKE.

And the plaintiff doth the like.

By her attorney, WM. H. POTTER.

And said cause being continued from term to term until the present November term, A. D. 1862, when it was called for trial and submitted to the following jury:

Geo. W. Whitman, foreman, Chas. W. Smith, Martin K. Cowing, Caleb Whitford, Thos. Cole, Fenner Potter, Wm. Tunmore, Israel Clarke, Chas. F. Carpenter, Reuben A. Clemence, David W. Hagan, Ephraim Howard.

12 Who return a verdict, which is duly affirmed in the words following, to wit:

The jury find that the said city of Providence is guilty, in manner and form as the plaintiff in her declaration thereof hath alleged, and assess damages in the sum of three thousand three hundred dollars.

(Signed) GEO. W. WHITMAN, *Foreman.*

Judgment.

Whereupon it is considered by the court here that the plaintiff have and recover of the said city of Providence the sum of three thousand three hundred dollars, debt and cost of suit taxed at two hundred and sixty-nine dollars and thirty-seven cents.

And after the rendition of the above judgment the defendant enters the following

Petition for writ of error.

Filed as of the 25th day of November, 1862.

To the honorable judges of the United States for the district of Rhode Island:

The said Marinus W. Gardiner, defendant as aforesaid, respectfully represents, that at the present November term of said court

judgment was rendered against him in his aforesaid capacity in favor of the plaintiff in said cause, upon the verdict of the jury therein.

That the said defendant excepted to the charge of the court to the jury, and the ruling of the law in said cause, as fully appears
13 in the bill of exceptions filed in said cause. Whereupon said defendant prays that a writ of error may be allowed in said cause, returnable to the December term of the Supreme Court of the United States, next to be holden at Washington, on the first Monday of December, A. D. 1863.

T. A. JENCKES,
For Defendant.

Writ of error allowed.

NATHAN CLIFFORD,
Associate Justice of the Supreme Court of the United States.

And with the above petition was presented and approved the following

Bond for costs.

Filed as of the 25th day of November, 1862.

Know all men by these presents that we, Joseph C. Peckham, treasurer of the city of Providence, in the State of Rhode Island, as principal, and Jabez C. Knight, of said city and State, as surety, are held and firmly bound unto Anna R. Babcock, of the city and county of Newport, in said State, in the sum of six thousand dollars, to which payment well and truly to be made we bind ourselves, our heirs, executors, and administrators, jointly and severally by these presents.

Sealed with our seals and dated this 21st day of July, A. D. 1863.

14 The condition of this obligation is such, that whereas the said Anna R. Babcock, by her next friend, obtained judgment in an action at law against Marinus W. Gardiner, then treasurer of said city of Providence, at the November term of the circuit court of the United States for the first circuit within and for the district of Rhode Island, holden at said Providence on the fifteenth day of November, A. D. 1862.

And whereas the said city of Providence have, by their present treasurer, Joseph C. Peckham, aforesaid, prosecuted a writ of error to the Supreme Court of the United States in the above-named cause, to reverse the judgment rendered therein against them in favor of the said Anna R. Babcock, by said circuit court of the United States for the district of Rhode Island, at its November term, at said Providence, A. D. 1862.

Now, therefore, if the said city of Providence, by their present treasurer aforesaid, shall prosecute their said writ of error to effect, and answer all damages and costs if they fail to make their plea

good, then the above obligation to be void, else to remain in full force and virtue.

JOSEPH C. PECKHAM, [L. S.]
City Treasurer.
JABEZ C. KNIGHT. [L. S.]

Signed sealed and delivered in presence of—
JAS. M. CROST.
Witness to the signature of J. C. Peckham and Jabez C. Knight.

Approved. NATHAN CLIFFORD,
Asso. Just. Supreme Court U. S.

15 *Bill of exceptions.*

Filed June 25th, 1863, as of the 24th day of November, 1862.

The defendants offered evidence tending to prove that the defect in the street in question was an opening in the side-walk adjoining a brick store, extending fifteen and a half inches from the side of the building, and about four feet long, and covered with a substantial door, which turned upon hinges, near the building, and which, when raised, left an opening to the cellar of twelve to sixteen inches in width outside of the curb-stone; that said cellar entrance had been constructed and used for the purpose of business for a long period of time.

Testimony was also introduced tending to show that the opening in the side-walk had been there for a long period, as variously stated by the witnesses, some of the witnesses stating this period at fifteen years; others at from twenty to twenty-four years.

The street was laid out in 1829, and one of the witnesses said the opening was used as an entrance to the cellar of the store before the street was laid out. Several witnesses—and among the number was one or more of the occupants of the store—testified that the opening in the side-walk was used to take in and take out goods from the cellar of the store, and for that purpose the lid or cover was raised whenever the occupants of the store had occasion so to do
16 in their daily business. They, the occupants of the store, testified that they intended to keep it closed when not opened for such use; but one of them stated that he could not say that it was always done. They also stated that it was opened whenever they had occasion to use the entrance to the cellar of their store; and it was the only entrance to the cellar of the store from the street, and was opened, more or less, every business day of the year.

Proof was also introduced showing, or tending to show, that the highway or street in question was in the central part of the city of Providence, and that the side-walk on which was the opening constituting the alleged defect in the said highway or street was one greatly travelled by persons on foot, and that the office of the mayor of the city of Providence was on the same street and nearly opposite to the alleged defect. Evidence was also introduced that complaints

had been made to the occupants of the store that the opening upon said sidewalk was unsafe. Plaintiff also proved that the day of the accident was commencement day, and that a public procession was passing near the place where it occurred, and that many persons were then travelling in that street.

Full proof was introduced that the plaintiff, while walking along in the street, stepped into the opening and fell to the bottom of the cellar of the store, a distance of seven feet or more, but it did
17 not appear who opened the said entrance next before the accident; but no one was engaged in taking in goods or taking them out, and no one was in the cellar when the plaintiff fell through the opening. One of the occupants of the store and a clerk were in the store over the cellar, and another of the occupants was standing in the street, on the opposite side of the same, looking at the procession, and he testified that on that occasion the aforesaid entrance to the cellar and opening in the side-walk had not been opened more than six minutes. Much other testimony was also introduced on the one side and the other which is not reported.

The court instructed the jury that the plaintiff, in order to maintain her action upon the merits, must prove—

1st. That the way described in the declaration is a street for travel, which the city of Providence is bound by law to keep in repair.

2d. That the highway was defective on the day of the injury.

3d. That the city had notice of the defect in the street or highway.

4th. That the plaintiff was travelling with ordinary care.

5th. That the plaintiff was injured.

6th. That the injury was occasioned solely by the defect in the street, and not from any negligence or want of ordinary care on the part of the plaintiff.

18 The court also instructed the jury that cities and towns were obliged to keep their highways and public streets safe and convenient for travellers, but whether they were safe and convenient or defective, out of repair and dangerous, was a question of fact for the jury, under the instructions of the court, and that they would determine that question between these parties upon all the evidence in the case; that the defendants were bound to construct and keep this street safe and convenient for travellers; and that if the jury found from the evidence that the alleged opening in the side-walk was a defect in the said street, which rendered the street unsafe, inconvenient, and dangerous, then the city had no right to keep and maintain the street for public travel, without removing or repairing such defect, and rendering the street safe and convenient for travellers.

After the foregoing instructions were given, the defendant requested the court to instruct the jury in the form following, to wit:

The defendant offered evidence tending to prove that the defect in the street in question was an opening in the side-walk adjoining a brick store, extending fifteen and a half inches from the side of the building, and about four feet long, and covered with a substantial cover, which turned upon hinges, near the building, and
19 which, when raised, left an opening to the cellar of twelve

inches in width; that said side-walk was six feet in width outside of the curb-stone; that the cellar entrance had been constructed and used for the purposes of business prior to the time when the highway was laid out over the land adjoining the building and including this side-walk; that the cellar way had been used by the occupants of the store for more than forty years, for the purpose of taking in and putting out merchandise in the course of their business, being opened for that purpose as required during the periods of actual use; that on the occasion of the accident the door covering the opening had been raised for use by the occupants of the store but six or eight minutes; that no complaint had been made to the occupants of the store, or to the city authorities, of this mode of use, though this street was one of the great avenues for pedestrians in the city of Providence.

And thereupon asked the court to charge the jury that the owners of the store had the right so to use this opening in the side-walk for the purposes of actual business; that it was not negligence on the part of the city to allow such an opening, so protected and used, to be continued, and that upon the evidence the city had no notice that the highway was unsafe or inconvenient by the opening of the
20 cellar door and keeping it open for use during the period testified to. But the court refused so to instruct the jury, remarking at the same time that the instructions already given were sufficient to enable the jury to decide the issue between these parties. Instructions were also given upon the preliminary questions involved in the issue and upon the subject of damages.

To all which instructions as given, and refusals to instruct, the said defendant then and there, in the presence of the jury, excepted. And the said cause was thereupon, under the charge of the court, submitted to said jury, who returned a verdict for the plaintiff for the sum of three thousand three hundred dollars.

And inasmuch as the several matters herein set forth do not appear of record, the defendants then and there, before the jury retired from the bar, presented their exceptions, and requested the court to sign and seal the same; which is accordingly done as of that date.

NATHAN CLIFFORD, [SEAL]
Associate Justice Supreme Court of the United States.

21 *Writ of error.*

ANNA R. BABCOCK
vs.
MARINUS W. GARDINER, city treasurer.

UNITED STATES OF AMERICA, *ss:*

The President of the United States to the judges of the circuit court of the United States holden in and for the Rhode Island district, greeting:

Because that in the record and process, and also in the recording of judgment in the suit before you, or some of you, between

Anna R. Babcock, of the city and county of New London, in the State of Connecticut, by her next friend, Simeon R. Babcock, a citizen of said city and county of New London and State aforesaid, plaintiff, and Marinus W. Gardiner, city treasurer of the city of Providence, in said Rhode Island district, defendant in an action on the case, a manifest error has intervened to the great damage of the said defendant, as has in his complaint been stated; and it is just and proper that the error, if any there be, should be corrected in due manner, and that full and speedy justice should be done to the parties aforesaid in this behalf.

You are hereby commanded, that if judgment thereof be given, then, under your seal, you do distinctly and openly send the record and process in the suit aforesaid, with all things concerning them and this writ, so that you have the same before the chief
22 justice and the associate justices of the Supreme Court of the United States, on the first Monday of December next, at Washington, being the present seat of the national government, that the record and process aforesaid being inspected they may cause to be done thereupon what of right ought to be done.

Witness the Hon. Roger B. Taney, our chief justice of Supreme Court, this fifteenth day of August, A. D. 1863.

HENRY PITMAN,
Clk Cir. Co't U. S., R. I. Dist.

Allowed: JOHN PITMAN,
District Judge U. S., R. I. Dist.

August 15th, 1863.

23 RHODE ISLAND DISTRICT, *ss:*

The President of the United States of America to the marshal of said district, or to his deputy, greeting:

You are hereby required to make known to Anna R. Babcock, of the city and county of New London, in the State of Connecticut, a minor, who sues by her father and next friend, Simeon R. Babcock, a citizen of said city and county of New London and State aforesaid, that in a certain action on the case wherein the said Anna R. Babcock, as aforesaid, was plaintiff, and Marinus W. Gardiner, city treasurer of the city of Providence, in said Rhode Island district, was defendant, wherein judgment was rendered against said defendant in the circuit court of the United States for the first circuit, holden at Providence, within and for the Rhode Island district, at the November term thereof, A. D. 1862, the said defendant has this day sued out a writ of error unto the Supreme Court of the United States, next to be holden at Washington, on the first Monday of December next, A. D. 1863, and has, also, given bond with good and sufficient surety in the sum of six thousand dollars to prosecute said writ of error with effect, and to answer all damages and costs.

And that the said Anna R. Babcock, by her father and next friend, Simeon R. Babcock, is therefore cited and admonished to appear at said Supreme Court to show cause, if any there be, why the

judgment rendered against said Marinus W. Gardiner, city treasurer, as aforesaid, in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the
24 parties in that behalf.

Witness the seal of said circuit court and my hand this fifteenth day of August, A. D. 1863.

JOHN PITMAN,
Dist. Judge United States for the District of Rhode Island.

PROVIDENCE, *Sept.* 4, '63.

I hereby acknowledge service of within citation.

WM. H. POTTER,
Att'y for Anna R. Babcock.

25 UNITED STATES OF AMERICA,
Rhode Island District, ss:

CLERK'S OFFICE, CIRCUIT COURT,
At Providence, September 4th, 1863.

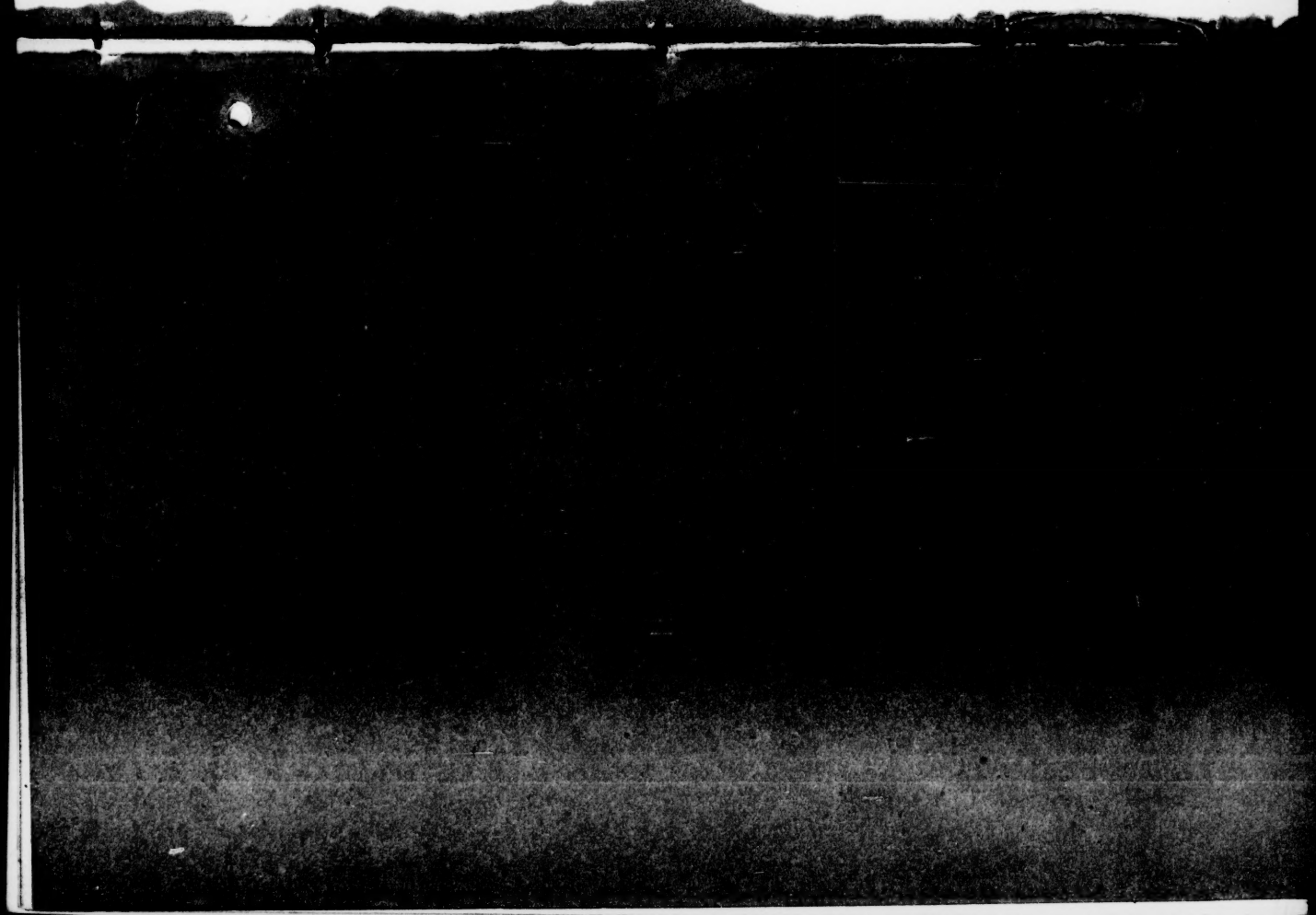
I, Henry Pitman, clerk of said court for said district, in pursuance of the command contained in the within writ of error, do make return thereof, and annex hereto, and transmit herewith a true copy of the entire record and of all proceedings in the cause or suit of Anna R. Babcock, plaintiff, against Marinus W. Gardiner, city treasurer, defendant, wherein judgment was rendered in said circuit court of the United States.

I also annex the citation served by acknowledgment upon the issuing of said writ of error, a copy of which writ was lodged in this office on the fifteenth day of August, 1863, and filed by agreement as of the twenty-fifth day of November, 1862, by the plaintiff in error for the adverse party.

In testimony whereof, I have hereunto set the seal of said court this fourth day of September, A. D. 1863.

[SEAL.] HENRY PITMAN, *Clerk.*

Filed October 19, 1863.



Supreme Court of the United States.

M. W. GARDINER, City Treasurer,

vs.

ANNA R. BABCOCK.

BRIEF FOR THE PLAINTIFF IN ERROR.

This action is founded upon a statute of Rhode Island, requiring cities and towns to keep their highways safe and convenient for travellers.

Rev. Statutes of R. I. of 1857, *Ch.* 44, *Sec.* 1, *p.* 122.

The case is stated in the bill of exceptions on pages 8 and 9—10 of the record.

The points material to be considered upon this hearing are the following:

The passage way where the injury to the defendant in error occurred was situated between a brick store and the market-house, in the town of Providence. It had been used as a private way before it had been laid out and accepted as a highway by the town. The defect complained of, and by reason of which the injury occurred, was the entrance to the cellar

of the brick building adjoining the passage way, extending into the sidewalk from the side of the building, fifteen and a half inches, and about four feet long, which was covered with a substantial plank covering, and when that was raised left an opening to the cellar of twelve inches in width, in a sidewalk six feet wide. This cellar entrance had been constructed and used by the occupants of the store for more than forty years for the purpose of taking in and putting out merchandise in the course of their business, being opened for that purpose as required during the periods of actual use. The cellar way had thus been used for the purposes of business prior to the time when the highway was laid out over the land adjoining the building and including this sidewalk. No complaint had been made to the occupants of the store or to the town or city authorities of this mode of use, although this street was one of the great avenues for pedestrians in the city of Providence. On the occasion of the accident, the door covering the opening had been raised for use by the occupants of the store but six or eight minutes.

The propositions contained in the request for instructions, which were refused, are the following:

FIRST.

That the owners of the land adjoining the highway, and upon which the brick store was erected, had a right to use the land under what was originally the sidewalk of a private way, and subsequently of a public highway, for the purposes of a cellar, provided they covered such cellar or cellar entrance with substantial coverings, so as not to render the sidewalk unsafe for pedestrians, and that they also had the right to raise the coverings of the cellar way in such sidewalk for the purpose of actual business, and to keep them open while so engaged in such use.

To this effect have been the decisions of the Supreme Court of Massachusetts, under a statute containing the same requirements as that of Rhode Island.

See O'Linda vs. *Lathrop*, 21 *Pick., pp.* 292–297; *Underwood* vs. *Carney et al.*, 1 *Cush.*, 285.

SECOND.

That it was not negligence on the part of the city to allow such an opening, so protected and used, to be continued.

This proposition is not shaken by the decision of the Supreme Court of Massachusetts, in *Bacon* vs. *the City of Boston*, 2 *Cush.*, 174.

In that case the aperture was permanently uncovered, and used for the purpose of admitting light into the adjoining cellar.

The instruction of the court was applicable only to cases of apertures kept continually open, or to such as might have insufficient and unsafe coverings.

THIRD.

That the jury should have been instructed that upon the evidence the city had no notice that the highway was unsafe or inconvenient by the opening of the cellar door and keeping it open for use during six or eight minutes.

When the cellar-way was covered, no defect in the highway existed. This was its condition during all the night, and for the greater portion of the day. When open for use

and in actual use, both the public and the land owners enjoyed their rights without conflict, and the aperture would not become a defect in the highway. If opened wrongfully by a stranger, or if left open by the proprietor after the actual and proper use had ceased, then it would be a question of fact for the jury whether the city had notice of the stranger's trespass, or the proprietor's negligence, to make its inhabitants liable for their negligence on the special occasion.

It is submitted that towns and cities are not liable for negligence in the repair of their highways in consequence of the lawful use by proper means by the proprietors of adjoining lands of their rights in the soil.

T. A. JENCKES,
for Plaintiff in Error.

It is not inconsistent with the rights of the public in the use of a highway, that an adjoining proprietor should excavate the soil beneath the travelled way for the purposes of sinking a drain or constructing a watercourse. In the State of Rhode Island, and in the other States which have similar laws on the subject of highway, there are hundreds of mill trenches and railways conducted under highways, and covered by substantial structures by the proprietors of the mills. It is not negligence in the towns and cities to permit such structures, nor is there any case in which any town or city has been held liable by reason of the accidental failure of such structure, unless the defect caused thereby has existed for a sufficient length of time to cause the presumption of notice to the proper authorities.

So the adjoining proprietors have a right to place doors, shutters, and gates, so that they may swing into the street and over the sidewalks. If these are opened for actual use, it is submitted that the convenience of the public must yield to the convenience of the proprietor during the period of use, just as in the case of taking in and discharging merchandise across a sidewalk, or from a carriage in the street. Such door, gate, or shutter cannot become a nuisance, for which the town or city may be indicted or become liable to damages for an injury arising therefrom, unless an improper mode of use should be continued for such a period of time as to constitute proof of notice to the authorities.

If a pedestrian should break through the defective covering of a drain or watercourse, or should strike his head against a gate or shutter swinging into the street, which had been carelessly left open by the proprietor, he has his remedy against such proprietor, and not against the town or city. So if a horse or carriage should back through the defective covering of a trench, the proprietor of it is bound to respond in damages for any injury that may be caused thereby, as he is the insurer to the public of the strength and sufficiency of his structures beneath the travelled way of a street.

Many other cases are constantly occurring in our cities. Some portion of the travelled way is used for awnings.

posts, signs, gas fixtures, cranes, and other contrivances for the convenience of business, and no case has been cited in which a town or city has been held liable for an injury by reason of any defect in such structures, unless it had existed long enough to raise the presumption of notice. Six or eight minutes has never been held a sufficient length of time to even raise a presumption of such knowledge.

If towns and cities under our local statutes are to be held liable for every accident that may occur at any time when a door or cellar way shall be opened for use, if the proprietor or his clerk should step across the street for two or three minutes, then they must either require such apertures to be closed entirely, or station a police officer in sight of them all the time.

The cases decided by this Court, and referred to in the brief of the counsel for the defendant in error, are believed to affirm the views here presented.

In the case of *Chicago City vs. Robbins* the distinction is clearly drawn between a lawful and proper mode of use of a street by the adjoining proprietor, and such an abuse of his rights as would create a nuisance.

T. A. JENCKES,
For Plff. in Error.

The photographs are presented as chalk-mark illustrations of the place where the accident occurred. *A* represents that portion of the cellar way and the sidewalk as closed, and *B* shows its condition at the time of the accident.